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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 309

AKTIEBOLAGET SEPARATOR,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

BENJAMIN A. MATTHEWS,
HAROLD HARPER,
Counsel for Petitioner.

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AKTIEBOLAGET SEPARATOR,

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vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Aktiebolaget Separator, taxpayer, for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit alleges:

By its judgment of July 6, 1942 (R. 137) the Circuit Court of Appeals has affirmed the order of the Board of Tax Appeals made September 30, 1941 (R. 34), which determined that there was a deficiency of $46,697.60 in income tax for the year 1936.

Statement of Facts.

The uncontroverted facts as they appear from the Statement of Evidence and exhibits (R. 43-132) and from the

findings of the Board of Tax Appeals (R. 19-26) may be summarized as follows:

Petitioner is a corporation organized in 1883 under the Laws of the Kingdom of Sweden and at all times since then has had its principal office in Stockholm, Sweden. It is engaged in the manufacture of centrifugal machinery and has interests throughout Europe and elsewhere. It is not, and during the taxable year was not engaged in trade or business within the United States (R. 19).

On October 23, 1936, petitioner, having decided to establish an office in New York, leased for the purpose Room 1521 in the building at No. 165 Broadway, New York, from The De Laval Separator Company, for a two-year term from November 1, 1936, at an annual rental of $500 (Ex. 1, R. 45, 86). Petitioner entered into possession of Room 1521 on November 1, 1936, and occupied it up to the date of trial (R. 47, 83).

The De Laval Separator Company, a New Jersey corporation, has had its principal office at 165 Broadway since 1907. During the taxable year and for many years prior thereto, petitioner owned approximately 85% of its stock. The De Laval Steam Turbine Company, a New Jersey corporation, also has had an executive office at 165 Broadway since 1907, but its principal place of business is at Trenton, New Jersey. Both of the De Laval companies have maintained their offices on the 15th floor of the building at 165 Broadway under a lease in the name of The De Laval Separator Company (R. 20).

An employee of the subsidiaries, for the additional compensation of $25 per month (R. 21) was placed in charge of petitioner's office in Room 1521 (R. 21).

Petitioner's name was conspicuously displayed at the entrance of Room 1521, and appeared on the building bulletin boards (R. 22, 47, 48, 84). The office had a cable

address separate from that of the De Laval companies. This office and cable address appeared on petitioner's stationery used by its New York office (R. 22, 49; Exs. 5, 6, R. 50, 90, 91). Petitioner's representatives, including its managing director, used the office when in the United States (R. 24, 72, 73).

The employee in charge of the office was duly authorized by petitioner (R. 21; Ex. 3, R. 46, 88) to perform various necessary duties on its behalf and to sign checks on one of petitioner's New York bank accounts (R. 21-22). Books were set up and maintained (R. 56, 72; Ex. 14, R. 57, 100); files were established (R. 72); funds were borrowed and used (Ex. 14, R. 57, 100, Ex. 29, R. 66, 124); and petitioner's tax obligations received all necessary attention (R. 74). Funds received were deposited in petitioner's bank account and were transmitted to Sweden as instructed. Periodical reports were made to petitioner's head office in Stockholm.

In November, 1936, petitioner advised the De Laval companies that it had opened an office at 165 Broadway, New York, New York, and instructed them to deliver all future dividends and notices to its office at that address. The De Laval companies notified the Commissioner of Internal Revenue and informed him that thereafter they would pay dividends to petitioner at its New York office and (under Regulations 94, Article [illegible]2) would not withhold the tax (R. 25; Exs. 7, R. 52, 93; Ex. 9, R. 53, 96). The Deputy Commissioner gave his approval by letter dated December 9, 1936 (R. 25; Exs. 8, R. 62. 95; Ex. 10, R. 62, 98). Federal income taxes were not withheld or deducted by the De Laval companies. The dividends were paid directly to petitioner at its New York office and were deposited in petitioner's account with the Marine Midland Trust Company (R. 25, 26; Ex. 13, R. 56, 100; Ex. 14, R. 57, 100; Ex. 16, R. 60, 102).

During 1936 petitioner's income from sources within the United States consisted of these dividends, aggregating $693,973.75. Each of the De Laval companies was a domestic corporation, subject to taxation under Title I of the Revenue Act of 1936 (R. 20).

Petitioner's Federal income tax return for the year in question was filed with the Collector of Internal Revenue for the Second District of New York (R. 20).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended (43 Stat. 938).

Statute.

The portions of the Revenue Act of 1936 (49 Stat. 1717) that are material are as follows:

SEC. 231. TAX ON FOREIGN CORPORATIONS.

(a) *Nonresident Corporations:* There shall be levied, collected, and paid for each taxable year, in lieu of the tax imposed by sections 13 and 14, upon the amount received by every foreign corporation not engaged in trade or business within the United States and not having an office or place of business therein, from sources within the United States as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, a tax of 15 per centum of such amount, except that in the case of dividends the rate shall be 10 per centum, and except that in the case of corporations organized under the laws of a contiguous country such rate of 10 per centum with respect to dividends shall be reduced to such rate (not less than 5 per centum) as may be provided by treaty with such country.

(b) *Resident Corporations:* A foreign corporation engaged in trade or business within the United States or having an office or place of business therein shall be taxable without regard to the provisions of subsection (a), but the normal tax imposed by section 13 shall be at the rate of 22 per centum instead of at the rates provided in such section.

Question.

Whether the petitioner, a Swedish corporation, had an office or place of business in the United States within the meaning of Section 231 of the Revenue Act of 1936.

The Board of Tax Appeals in its opinion reported at 45 B. T. A. 243 (three members dissenting) held that petitioner's office did not come within the statute because petitioner was not engaged in trade or business in the United States and its office was not established for the purpose of transacting trade or business.

On the basis of this holding the Board of Tax Appeals at the same time decided *Linen Thread Company* v. *Commissioner of Internal Revenue,* (unreported).

The *Linen Thread* case was affirmed by the Circuit Court of Appeals (128 F. (2d) 166) the court holding in an opinion dated May 15, 1942, that an office or place of business which was not used or kept for the transaction of the ordinary or principal business of the corporation did not come within the meaning of the statute as interpreted by Regulations 94, Article 231-1(b). Based on that opinion the Circuit Court affirmed the order of the Board of Tax Appeals in the instant case.

Reasons for Granting Certiorari.

The reasons for granting certiorari in this case are:

1. The question is of public importance. The Board of Tax Appeals and the Circuit Court of Appeals have inter-

preted and applied the statute contrary to its plain meaning, and in complete disregard of the rules of statutory construction. The question of interpretation not only affects Section 231 of the Revenue Act of 1936, but also affects the same statutory language employed in Section 211, relating to resident and nonresident aliens. The interpretation would apply also to all years after 1936, since the same language has been employed in subsequent Acts.

2. No other Circuit Court of Appeals has directly passed upon the question and it has never been considered by this Court. The Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court.

3. The Circuit Court of Appeals has decided a Federal question in a way which is in conflict with the applicable decisions of this Court. The effect of the decision of the court below is to deny recognition of the existence of a corporate office unless the corporation is engaged in carrying on its trade or business at such office. Such a result conflicts with the decisions of this Court (*Green* v. *Chicago, Burlington & Quincy Railway Co.* (1907) 205 U. S. 530; *Toledo Railways & Light Company* v. *Hill,* (1917) 244 U. S. 49, 52; *McCoach* v. *Minehill Railway Co.* (1913) 228 U. S. 295, and numerous other authorities which have recognized that a corporation may have an office, although not carrying on business therefrom so as to be subject to service of process or to State taxation.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Second Circuit commanding that court to certify and send to this Court for its review and determination on

a day certain, to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket "Aktiebolaget Separator, petitioner, *vs.* Commissioner of Internal Revenue, respondent, No. 272," and that the said judgment of the said court may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

Dated New York, N. Y., August 5, 1942.

AKTIEBOLAGET SEPARATOR,
By BENJAMIN A. MATTHEWS,
HAROLD HARPER,
Counsel for Petitioner.